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No. 92-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LADUE, et al.,
Petitioners,

vs.

MARGARET P. GILLEO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a municipal ordinance barring a citizen from displaying a small sign at her own home, expressing her views on an important public issue, violates the First Amendment, especially where the ordinance allows other signs, both commercial and noncommercial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 986 F.2d 1180 (8th Cir. 1993). The relevant opinions of the district court (Pet. App. 11a, 22a) are reported at 774 F. Supp. 1559 and 1564 (E.D. Mo. 1991). Other orders of the district court are reported at 791 F. Supp. 238 and 240 (E.D. Mo. 1992).

STATEMENT

This case concerns a citizen's First Amendment right to display a small unobtrusive sign at her own home, expressing her views on an important public issue, notwithstanding a municipal government's asserted aesthetic interests disfavoring such signs. Despite petitioners' protestations to the contrary, their sign ordinance contains content-based preferences, some of which favor forms of speech entitled to less, not more, First Amendment protection than respondent's sign. Moreover, the ordinance is not a narrowly tailored means of serving petitioners' asserted interests.

1. In December 1990, respondent Margaret P. Gilleo was deeply concerned over the prospect of war with Iraq, which seemed imminent. J.A. 69. A St. Louis area group was distributing yard signs to raise public awareness of the issue and encourage people to contact their elected representatives in Washington. J.A. 40-41, 69. Ms. Gilleo obtained a sign and placed it in the front yard of her home. The sign was 24 by 36 inches, and combined graphics with text reading "Say No to War in the Persian Gulf, Call Congress Now." Pet. App. 22a; J.A. 194.[1] She intended her message to reach people driving through her subdivision, including residents, guests, household employees, delivery persons and tradespeople. J.A. 40-42, 76.

Ms. Gilleo lives in a residential subdivision of the City of Ladue, a suburb of St. Louis, Missouri. Ladue covers an area of approximately 8.5 square miles, and has a population of nearly 9,000. J.A. 148, 162. Shortly after she posted her

[1] A photograph of Ms. Gilleo's yard sign, which was part of the summary judgment record below, appears at J.A. 194, and in the Appendix to this brief at 1a.

sign, the Ladue police informed her that such signs were prohibited in Ladue. J.A. 70-71. Ms. Gilleo went to City Hall to further discuss the matter, and was given a copy of Ladue's sign ordinance. J.A. 71.

The ordinance ("Old Chapter 35") prohibited all signs in Ladue except those expressly authorized within the ordinance. Sec. 35-3, J.A. 27; Sec. 35-6, J.A. 28. Permitted signs included "municipal signs" (Sec. 35-2(a), J.A. 27); "[s]ubdivision identification signs" (Sec. 35-2(b), J.A. 27); "road signs for danger, direction or identification" (*id.*); "[s]igns...on a residence building stating only the name and profession of an occupant" (Sec. 35-2(c), J.A. 27); real estate for sale or for rent signs (Sec. 35-2(e), J.A. 27); signs for churches or schools (Sec. 35-11, J.A. 32); and a variety of commercial signs (Secs. 35-7 through 35-10, J.A. 28-31). Old Chapter 35 also permitted variances:

> The council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variation.

Sec. 35-5, J.A. 28.

Taking note of the variance provision, Ms. Gilleo made another trip to City Hall and subsequently appeared at a meeting of the Ladue City Council to seek a permit for her sign. J.A. 72-74. At the Council meeting, one of the points on which the discussion centered was the "controversial" nature of Ms. Gilleo's sign. Deposition of Thomas R.

Remington, J.A. 46.[2] The City Council voted unanimously to deny Ms. Gilleo a permit. J.A. 72-74.

2. On December 20, 1990, Ms. Gilleo commenced this action against the City of Ladue and various of its officials in the United States District Court for the Eastern District of Missouri under 42 U.S.C. § 1983. She alleged that Ladue's sign ordinance, on its face and as applied, violated her rights to free speech guaranteed by the First and Fourteenth Amendments, and sought declaratory and injunctive relief. J.A. 22-25.

Ms. Gilleo moved for a preliminary injunction, and an evidentiary hearing was held December 26, 1990. J.A. 2. Ladue presented witnesses at the hearing who testified that they objected to Ms. Gilleo's sign because they viewed it as controversial. Edith J. Spink, the Mayor of Ladue since 1975 and a petitioner here, testified that she considered Ms. Gilleo's yard sign to be "controversial," and she felt that controversial signs could lead to arguments or debates in Ladue neighborhoods, which should not be encouraged. J.A. 94, 161.[3] Mark G. Arnold, a lawyer and resident of

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[2] Mr. Remington, the President of the Ladue City Council for more than fifteen years, and a petitioner in this case, recalled another councilman stating at the meeting "that he felt that Ladue was the type of community that ensures its residents both the privacy, the freedom from having to observe signs ...." J.A. 43-45. Mr. Remington also recalled the same councilman questioning Ms. Gilleo "on whether she would advocate abortion versus nonabortion, would these be the kinds [sic]." J.A. 46.

[3] Mayor Spink also testified, in a pre-hearing deposition, that she would be more likely to vote for a variance allowing a sign stating "Free the Hostages," "Give up Dope" or "Narcotics Kill," than a sign stating "Right to Life," "Women's Lib" or "Stop War in the Gulf." J.A. 55-56.

Ms. Gilleo's subdivision, testified that "[w]hat the sign does, when you walk past it or these days, more likely drive past it, it forces the existence of that controversy into the forefront of your mind." J.A. 101.[4]

On January 7, 1991, the district court ruled that Ladue's sign ordinance, on its face, violated the First Amendment, and entered a preliminary injunction against its enforcement. Pet. App. 22a. Relying principally on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion), the district court concluded that "Ordinance 35 impermissibly places greater value upon commercial than noncommercial speech and impermissibly values the content of certain noncommercial speech over that of other noncommercial speech ...." Pet. App. 31a.

3. On January 21, 1991, fourteen days after the preliminary injunction ruling, Ladue amended its sign law by repealing Old Chapter 35 and adopting a replacement

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[4] Mr. Arnold also testified, in response to the question "how, if at all, do you believe that the placement of that sign in Ms. Gilleo's front yard, would affect the peace and quiet of your neighborhood, as you've described it?"

> Well, I frankly would prefer that she did not put the sign up and the reason is, that the sign is, by its very nature, a kind of a controversial sign, that calls upon me, it forces itself upon me and says, you know, react, agree, disagree, says it's a better idea to send Sadaam back to the Stone Age, by thermonuclear device or alternatively, that what we're doing there, is all wrong. I would rather not be confronted with that kind of a controversial thought, when I drive into my subdivision at the end of the day.

J.A. 97.

ordinance ("New Chapter 35"). J.A. 180-81.[5] New Chapter 35 was virtually identical to Old Chapter 35 with respect to its preferential treatment of commercial speech over noncommercial speech, and its valuing of some types of noncommercial speech over others. Like its predecessor, New Chapter 35 prohibited all signs except those authorized in the ordinance. Sec. 35-2, J.A. 121. Exempted from the general ban were ten categories of signs:

(a) Municipal signs but said signs shall not be greater than nine (9) square feet.

(b) Subdivision and residence identification signs of permanent character but said subdivision identification signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.

(c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.

(d) Health inspection signs but said signs shall not be greater than two (2) square feet.

(e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.[6]

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[5] Minor amendments to New Chapter 35, not relevant here, were enacted on February 25, 1991. J.A. 181.

[6] Sec. 35-5 of New Chapter 35 provided that churches, religious institutions and schools could erect, on the premises they occupied, "one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area ...." J.A. 122. Such signs could contain "announcements relating to the name

(f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.

(g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.

(h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.[7]

(i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.[8]

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of such church, religious institution, or school, its services, activities or other functions ...." J.A. 123. Such institutions further could "erect a temporary sign during a continuous period of not more than sixty (60) days, subject to the same limitations as to area and announcements." *Id.*

[7] Section 35-10 of New Chapter 35 limited for sale and for lease signs to "a single ground sign advertising the sale or rental of the real property upon which it is maintained"; limited the size of such signs to "not greater than six (6) square feet"; and limited the permissible content to statements "(a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's names; and (c) the owner's or agent's address or telephone number." J.A. 126.

[8] The size, location and numerical limitations for commercial signs in commercially or industrially zoned districts were similar to the requirements for such signs contained in Old Chapter 35. *Compare* New Chapter 35, Secs. 35-6, 35-7, 35-8 and 35-9, J.A. 123-26, *with* Old Chapter 35, Secs. 35-7, 35-8, 35-9 and 35-10, J.A. 28-31.

(j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.

Sec. 35-4, J.A. 121-22.

The principal change in the new ordinance from the old was that Ladue prefaced New Chapter 35 with a lengthy and self-serving preamble, captioned "Declaration of Findings, Policies, Interests and Purposes." Art. I, J.A. 116. The preamble declared that the sign restrictions contained in New Chapter 35 "are necessary to protect and preserve the City of Ladue's interests in privacy, aesthetics, safety and property values." J.A. 117.[9]

Worthy of note is that New Chapter 35, by its terms, seemed to prohibit the display of flags, including the American flag. Under New Chapter 35, the term "sign," in the context of the ordinance's general ban against signs, was defined to include "[a] name, word, letter, writing, identification, description, or *illustration*...which publicizes an object, product, *place*, activity, *opinion*, person, institution, organization or place of business ...." Sec. 35-1, J.A. 120 (emphasis added). New Chapter 35 further provided that "[t]he word 'sign' shall also include 'banners', 'pennants'...." *Id.* Ladue states, however, that all flags, including "an American flag or a flag containing the messages contained on respondent's signs," may be "displayed in Ladue regardless of their message as long as

[9] New Chapter 35 also circumscribed the City Council's authority to grant variances (Sec. 35-22, J.A. 130), in order to obviate the constitutional difficulties inherent in Old Chapter 35's allowance of unfettered discretion concerning variances. It further included a severability clause (Sec. 35-24, J.A. 130).

they are made of fabric and are not in the shape of a banner or pennant." Pet. Br. 40.[10]

4. On January 28, 1991, Ms. Gilleo filed an amended complaint challenging the constitutionality of New Chapter 35 on essentially the same basis as Old Chapter 35. J.A. 4, 185. On February 7, 1991, Ladue "filed a counterclaim seeking a declaratory judgment that New Chapter 35 is valid and enforceable under the Constitution." Pet. App. 11a-12a. At the time these pleadings were filed, Ms. Gilleo no longer was maintaining her yard sign, but was displaying a small sign inside a second-floor window of her home, visible from the street. J.A. 113-14, 188. The sign was 8½ by 11 inches and stated "For Peace in the Gulf." Pet. App. 3a.[11] The remaining proceedings below pertained to Ms. Gilleo's window sign.

The parties filed cross-motions for summary judgment. J.A. 113, 132. In support of its position, Ladue filed an affidavit of Malcom C. Drummond, a paid outside consultant to Ladue (J.A. 138, 139-40), and two affidavits of Mayor Spink (J.A. 161, 197). Respondent submitted an affidavit of Nancy R. Sachs, a Ladue resident. J.A. 190.[12]

[10] Ladue's interpretation of the ordinance's applicability to flags, and the significance of that interpretation for purposes of this case, are further discussed *infra* at pp. 23-24.

[11] A photograph of Ms. Gilleo's window sign, which was part of the summary judgment record below, appears at J.A. 195, and in the Appendix to this brief at 2a.

[12] Contrary to Ladue's assertions (Pet. Br. 20-21), respondent submitted the Sachs Affidavit for its first-hand factual observations, not as expert opinion. Ms. Sachs testified that she toured various subdivisions in Ladue on five separate occasions between January 30 and February 16, 1991,

On October 1, 1991, the district court entered a Memorandum and Order granting Ms. Gilleo's summary judgment motion, denying Ladue's motion, and permanently enjoining the enforcement of certain portions of New Chapter 35. Pet. App. 11a. The district court found that "New Chapter 35 suffers the same infirmities as Old Chapter 35 in that it prefers some protected speech to other speech based on content." Pet. App. 16a. On that basis, the court concluded that "[t]he general principles of law stated in the order of this Court granting Plaintiff's request for preliminary injunction with respect to Old Chapter 35 apply as well to New Chapter 35." Pet. App. 16a-17a.

5. Ladue appealed and, in a unanimous panel decision rendered February 22, 1993 (amended May 4, 1993), the United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a. The court of appeals, guided by the plurality opinion in *Metromedia*, *supra*, found New Chapter 35 to be a content-based regulation of speech in that it "favors commercial speech over noncommercial speech, and it favors certain types of noncommercial speech over others." Pet. App. 4a (footnote omitted).

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shortly after "Ladue made the public announcement that it would not enforce the terms of its ordinance until the federal court ruled on the constitutionality of the ordinance." J.A. 190. She reasoned that "this would be the perfect time to see for myself whether the lack of [an] enforceable ordinance—in effect no ordinance—would lead to a proliferation of political, non-commercial signs in Ladue," since this was a "tense period of war in the Middle East and highly-charged debate among the citizens of Ladue over this sign ordinance." J.A. 190-91. Ms. Sachs observed a number of American flags and yellow ribbons on her tours but did not see any other political signs. J.A. 191-92.

The court rejected Ladue's assertion that the "secondary effects doctrine," adopted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986), required that New Chapter 35 be viewed as content-neutral. Pet. App. 5a. The court stated that "[a]ssuming *arguendo* that the 'secondary effects' doctrine extends to cases involving the prohibition of political signs on private property," Ladue's secondary effects argument fails for want of sufficient support in that "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." Pet. App. 5a (footnote omitted). The court further stated that the lack of correlation between Ladue's asserted interests in eliminating the claimed secondary effects and the categories of signs singled out for discriminatory treatment "undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs." Pet. App. 6a.

Because Ladue's ordinance was a content-based restriction, the court of appeals held that it must withstand strict scrutiny to survive, *i.e.*, it "must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end." Pet. App. 6a-7a. While the court viewed Ladue's asserted interests as "substantial," it held that "the interests are not sufficiently 'compelling' to support a content-based restriction." Pet. App. 7a. The court further found that "Ladue's ordinance is not the least restrictive alternative." Pet. App. 7a. This Court granted certiorari on October 4, 1993. J.A. 199.

SUMMARY OF ARGUMENT

At issue here is a confrontation between one of our most cherished constitutional rights—a citizen's First Amendment right to freely express her views, at her own home, concerning an important public issue—and a municipal government's effort to promote its aesthetic tastes by banning an entire mode of political expression. As this Court said in another context, "[i]t is precisely this kind of choice...that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).[13] Both lower courts correctly concluded that Ladue's ordinance must be struck down.

1. Ms. Gilleo's sign constituted virtually pure speech and concerned an issue of war and peace. The sign was placed on her own private residential property, and was positioned to be visible from the street, which is a traditional public forum. Further, Ms. Gilleo's chosen form of speech constitutes an important mode of communication, particularly in the area of political expression. Small signs are a uniquely effective and inexpensive mode of speech, and have been a hallmark of American political expression throughout our history.

Thus, from the standpoint of its subject matter, location and mode, Ms. Gilleo's speech is of a kind entitled to the utmost degree of First Amendment protection. It requires no extended analysis to conclude that the First Amendment constrains Ladue from prohibiting Ms. Gilleo's sign.

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[13] Freedom of speech as protected by the First Amendment is among the fundamental guarantees which the Fourteenth Amendment makes applicable to the States. *See, e.g., Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846, 1849-50 (1992).

2. Ladue's ordinance is a particularly odious restraint against speech because it is content-based. Ladue has sought to pick and choose among subjects to be addressed by signs, decreeing that some will be allowed while others are prohibited. This Court made clear last term, in *City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S. Ct. 1505 (1993), that this sort of content-based regulatory scheme is antithetical to the First Amendment.

The content-discrimination inherent in Ladue's ordinance is especially egregious because the ordinance allows certain commercial signs but bans noncommercial signs, including those containing political speech, in the same locations. The ordinance thereby inverts the constitutional principle that noncommercial speech enjoys greater First Amendment protection than commercial speech.

Ladue argues that it constitutionally may allow onsite signs while prohibiting offsite signs; however, that is not Ladue's chosen regulatory scheme. Ladue's ordinance permits some onsite signs and some offsite signs, while banning others in both categories. Similarly, *Discovery Network* forecloses Ladue's contention that its ordinance should be deemed content-neutral as being aimed at "secondary effects" of signs. To the extent that there are any "secondary effects" from signs, they arise to the same degree from all signs, both prohibited and permitted. Further, Ladue's secondary effects argument amounts to little more than an effort to ban speech based on anticipated negative reactions of viewers, which is a constitutionally impermissible basis for regulation.

As a content-based restriction against free expression, Ladue's ordinance is subject to, and fails, strict scrutiny. Ladue's asserted aesthetic and other concerns are not sufficient to justify sealing off an entire community against

an important mode of expression. Nor is the ordinance narrowly drawn. Ladue attempts to limit the overall impact of signs not by content-neutral regulations regarding their number, size, point of placement or duration of display, but by banning virtually all signs throughout the city. That is not the least restrictive alternative; it is the most draconian way of addressing Ladue's stated concerns.

3. Even viewing Ladue's ordinance as content-neutral —which it is not—it fails to pass constitutional muster. As a ban against an important mode of expression, Ladue's ordinance must be subjected to a searching level of scrutiny akin to strict scrutiny, which it cannot survive.

Similarly, Ladue's efforts to justify its ordinance as a time, place and manner regulation are unavailing. Aside from the fact that the ordinance is not content-neutral, and bans signs rather than regulating their time, place and manner, Ladue's ordinance is not narrowly tailored. It burdens substantially more speech than necessary to serve Ladue's asserted interests, and there is no reasonable fit between Ladue's desired ends and chosen means. Moreover, the ordinance does not leave open ample alternative channels of communication. All of the alternatives put forth by Ladue are more expensive, more time consuming or less effective than the posting of a small sign and are, therefore, inadequate.

Ladue, in its time, place and manner argument, places heavy reliance on *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); however, that reliance is misplaced. *Vincent* concerned a content-neutral regulation of the time, place and manner of speech in an area which was not a traditional public forum, whereas this case involves a content-based ban against virtually an entire mode of expression on the speaker's own private property adjacent to a public forum. Accordingly,

Vincent is readily distinguishable from this case, and does not support, let alone compel, a conclusion that Ladue's sign ordinance is constitutional.

4. Ladue's contention that the decision below jeopardizes the constitutionality of the federal Highway Beautification Act, 23 U.S.C. § 131 (1988 & Supp. IV 1992), is a red herring. There are obvious differences between a government's interest in regulating large billboards, and its interest in regulating a small political sign like respondent's placed inside a window of her home. Moreover, the Act does not ban billboards; it merely restricts their placement in proximity to federal highways in certain zones. Thus, the Act is a time, place and manner regulation. Finally, the Act generally permits onsite signs but proscribes offsite signs, a scheme which can be deemed content-neutral and is markedly different from Ladue's ordinance. This case has little, if anything, to do with the Highway Beautification Act.

ARGUMENT

I. This Case Concerns Core Political Speech on the Speaker's Own Residential Property, which Commands the Utmost Degree of First Amendment Protection.

Without doubt, respondent's speech in this case is entitled to the highest level of First Amendment protection. It addressed a political issue of obvious public importance, occurred within Ms. Gilleo's own home, and utilized a traditional and uniquely important mode of expression.

Ms. Gilleo's sign reflected precisely the sort of free discussion of governmental affairs that the First Amendment was designed to promote. "[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs."

Mills v. Alabama, 384 U.S. 214, 218 (1966). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, Ladue's efforts to suppress Ms. Gilleo's speech strike at the very heart of the First Amendment.

Moreover, Ms. Gilleo's sign was placed within her own private residential property. Implicated here, then, is Ms. Gilleo's right to do what she wishes in her own home. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984), the Court commented on the fact that a ban against posting signs on utility pole wires on public property did not also extend to private property, stating "[t]he private citizen's interest in controlling the use of his own property justifies the disparate treatment." Likewise, in *Spence v. Washington*, 418 U.S. 405 (1974), the Court held that a statute prohibiting flag misuse could not constitutionally be applied against a person who hung an American flag, with a peace symbol affixed, upside down from a window of his residence. The Court emphasized that "the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression." 418 U.S. at 411. *See also Stanley v. Georgia*, 394 U.S. 557 (1969).

We note also that Ms. Gilleo placed her sign to be visible to passersby on the street. Streets are, of course, a traditional public forum for the exercise of First Amendment rights. This Court often has repeated the words of Justice Roberts, in *Hague v. CIO*, 307 U.S. 496, 515 (1939), that "streets and parks...time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," and "[s]uch use of the streets

and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980).[14]

As to Ms. Gilleo's chosen mode of expression, the notion of maintaining a sign at a residence reflecting an occupant's beliefs is no modern invention. The concept dates back at least to biblical times. In Deuteronomy, 6:4-9, it is written: "Keep these words that I am commanding you today in your heart...and write them on the doorposts of your house and on your gates." *Holy Bible, New Revised Standard Version* 181 (Oxford University Press 1989).[15] "The posting of signs is...a time honored means of communicating a broad range of ideas and information, particularly in our cities and towns." *Vincent, supra*, 466 U.S. at 818-19 (1984) (Brennan, J., dissenting). "'[O]utdoor signs have played a prominent role throughout American history, rallying support for

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[14] That the streets of Ladue may be residential, narrow or lack sidewalks does not remove them from the category of traditional public forum. *Frisby v. Schultz, supra*. Similarly, the fact that title to some of Ladue's residential streets may be held by private trusts, for the benefit of subdivision property owners, does not detract from the status of Ladue's streets as a traditional public forum. *See Hague v. CIO, supra; Marsh v. Alabama*, 326 U.S. 501 (1945).

[15] This passage is the source of the Jewish custom of displaying a *mezuzah*—a small wood or metal tube-like case containing an inscribed parchment—on the gates and doorposts of a dwelling. "[T]he *mezuzah* has become the distinctive mark of the Jewish home ...." Rabbi Ben Isaacon & Deborah Wigoder, *The International Jewish Encyclopedia* 210-11 (Prentice-Hall 1973). As an identifying device and, moreover, one which often is decorated with illustrations and Hebrew letters, a *mezuzah* would appear to be banned by Ladue's sign ordinance.

political and social causes'." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion), quoting lower court opinion, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980) (Clark J., dissenting).

Yard and window signs are a staple of American political campaigns. A sign "entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer." *Vincent*, *supra*, 466 U.S. at 819 (Brennan, J. dissenting). "[S]mall posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can't buy." Dick Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (Swallow Press 1981).

The display of a small sign constitutes virtually "pure speech," as opposed to a mixture of speech and conduct. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-06 (1969). The extent of permissible governmental regulation decreases as the mode of expression moves away from speech combined with conduct and towards pure speech. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989); *California v. LaRue*, 409 U.S. 109, 117 (1972). Accordingly, Ms. Gilleo's mode of speech was of a form which the First Amendment renders most inviolate from government regulation.

In sum, the speech at issue here represents pure speech of a political nature on the speaker's own private residential property adjacent to a traditional public forum. On grounds of its subject matter, location and mode, Ms. Gilleo's speech

is entitled to the utmost degree of First Amendment protection. Indeed, if the First Amendment does not protect a citizen's right to maintain a small unobtrusive sign at her own home expressing her views on an important public issue, it is hard to imagine what it does protect.

This Court has devoted much attention in recent years to the degree of First Amendment protection to be afforded to various kinds of speech which some have argued lie beyond the central focus of the First Amendment. *See, e.g, Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S. Ct. 2456 (1991) (nude dancing); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent speech). In so doing, the Court should not become distracted from its historic commitment to protecting the kinds of political speech which all agree lie at the very core of the First Amendment. Ladue's actions here are an example of the "tyrannies of governing majorities" which the First Amendment was intended to guard against. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

Because it seems so clear that the First Amendment precludes Ladue's efforts to suppress Ms. Gilleo's speech in this case, it is tempting to eschew application of the traditional tests for determining whether a particular governmental restriction against free expression is constitutional. Were application of any such test to suggest that Ladue's sign ordinance is constitutional, that would serve only to call into question the validity of the test being applied, or the manner of its application, not the proper outcome of this case. In any event, as discussed below, Ladue's sign ordinance cannot pass constitutional muster under any recognized analytical framework.

II. Ladue's Sign Ordinance is a Content-Based Speech Restriction which Cannot Survive the Strict Scrutiny that the First Amendment Demands.

The proper test for determining whether a governmental restriction against protected speech, on private property or in a public forum, is permissible under the First Amendment depends, in part, on whether the restriction is content-based or content-neutral. If a restriction is content-based, it must be subjected to strict scrutiny and is constitutional only if the government shows that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846, 1851 (1992); *Simon & Schuster v. New York Crime Victims Bd.*, ___ U.S. ___, 112 S. Ct. 501, 509 (1991).

Ladue's sign ordinance is a content-based speech restriction. It, therefore, must withstand strict scrutiny to survive, but fails both prongs of that test.

A. Ladue's Ordinance Is Content-Based.

1. The Ordinance is Content-Discriminatory on its Face.

A restriction against speech may be content-based either because it favors or disfavors certain viewpoints, or because it discriminates among various subjects. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). *See Burson v. Freeman*, *supra*, 112 S. Ct. at 1850; *Arkansas Writers' Project, Inc. v. Ragland*,

481 U.S. 221, 230 (1987); *Metromedia*, *supra*, 453 U.S. at 519 (plurality opinion); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

On its face, Ladue's ordinance treats signs differently based on their content. Ladue has attempted to limit signs by picking and choosing among various subjects addressed by signs, allowing some and prohibiting others. For example, a 24 by 36-inch sign stating "House For Sale By Owner, Call xxx-xxxx", is permitted, while a similar sign stating "Car For Sale by Owner, Call xxx-xxxx", or containing any political message, is prohibited.

One or more one square-foot residence identification signs, or twelve square-foot driveway identification signs, stating "The Jones Family" are allowed. Indeed, it may be that such identification signs also are permitted to advertise the profession of an occupant, even though the residence is not the site of the occupant's professional practice.[16] However, a smaller sign in the same location stating "For Peace in the Gulf" is prohibited.

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[16] Old Chapter 35 defined permitted residence identification signs as "[s]igns not exceeding one (1) square foot of display surface on a residence building stating only the name and profession of an occupant." Sec. 35-2(c), J.A. 27. New Chapter 35 defines such signs solely in terms of their size (Sec. 35-4(b), J.A. 122), and permits "driveway signs for ...identification" of up to twelve (12) square feet (Sec. 35-4 (c), J.A. 122), but is silent as to the permissible content of identification signs. The most reasonable interpretation of New Chapter 35 is that it continues the practice allowed under Old Chapter 35 of advertising one's profession. Had Ladue intended to terminate that practice by virtue of New Chapter 35, it likely would have so specified, since such a change probably would have required many Ladue residents to revamp existing identification signs.

A Ladue resident may display an unlimited number of twelve square-foot driveway signs for "direction" or "danger" (Sec. 35-4(c), J.A. 122), *e.g.*, signs stating "No Trespassing", "Tradespeople Use Rear Door" or "Beware of Dog" (J.A. 59-60, 107-08). A church or school may post two sixteen square-foot signs stating "Pancake Supper Friday" or "Lecture Sunday: Say No to Abortion." Sec. 35-5, J.A. 122-23. Ms. Gilleo, however, cannot post a single much smaller sign suggesting that citizens contact their elected representatives about an issue of war and peace.[17]

In *City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S. Ct. 1505 (1993), Cincinnati sought to defend, against a First Amendment challenge, an ordinance banning newsracks distributing commercial publications from public sidewalks, while allowing similar newsracks purveying newspapers. This Court concluded that "by any common-sense understanding of the term, the ban in this case is 'content-based'" because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." 113 S. Ct. at 1516-17. The same is true here. Under Ladue's sign ordinance, one must read a sign to determine whether it is allowed or prohibited.

A telling illustration of the content-discriminatory and, indeed, arbitrary nature of Ladue's sign ordinance is its

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[17] Giving churches, religious institutions and schools more freedom to post signs than individuals cannot be justified on the basis of any zoning classification distinction since, under Ladue's zoning ordinance, schools, churches and religious institutions may be located in residential districts. Ladue Zoning Ordinance No. 1175 at 26, Ex. F to Drummond Affidavit, reproduced in Appellant's Appendix filed in the Court of Appeals August 19, 1992, Vol. I, at 183, 200 [Sec. VII(D)(1)].

treatment of flags. As discussed *supra* at pp. 8-9, the plain language of New Chapter 35, by its definition of "sign" and express reference to "banners" and "pennants," appears to ban flags.[18] Ladue contends, however, that all flags are permitted, irrespective of their message, so long as they are made of fabric and are not in the shape of a banner or pennant. This contention is premised on Ladue's argument that "[a] 'flag' is defined by the fabric material used in its construction and is typically square or rectangular shaped", whereas a "banner" has a "unique elongated rectangular shape", and a "pennant" is "a rectangle tapered to a single point." Pet. Br. 39.

Accepting Ladue's contention, New Chapter 35, for no discernible reason, discriminates in favor of flags made of fabric, no matter how large or numerous, and against signs of similar appearance made of paper, cardboard or plastic. We note that the ordinance contains no suggestion that a permitted flag must hang limp, flutter or be displayed in any other particular manner; accordingly, a flag may be heavily starched, stretched across a frame, affixed to the side of a building, or hung sideways. As interpreted by Ladue, then, New Chapter 35 permits a homemade sign fashioned from a

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[18] The dictionary definition of "flag" includes "1. a piece of cloth, varying in size, shape, color, and design, usually attached at one edge to a staff or cord, and used as the symbol of a nation, state, or organization, as a means of signaling, etc.; ensign; standard; banner; pennant." *The Random House Dictionary of the English Language* 538 (Jess Stein & Laurence Urdang eds., Unabridged ed. 1981). The definition of "banner" includes "1. the flag of a country, army, troop, etc. 2. an ensign or the like bearing some device, motto, or slogan, as one carried in religious processions, political demonstrations, etc.... 4. a sign painted on cloth and hung over a street, entrance, etc." *Id.* at 117. The definition of "pennant" includes "any relatively long, tapering flag." *Id.* at 1066. *See also* Francis Scott Key, "*The Star Spangled Banner*" (emphasis added).

bed sheet, but prohibits smaller and neater signs not made of fabric.[19]

Moreover—and, again, without rational basis—Ladue's ordinance bans all signs, including flags, which are in the shape of an elongated rectangle or a pennant, even if made of cloth. Thus, for example, all athletic team and collegiate pennants are banned.

Ladue asserts that a city may permit onsite signs, *i.e.*, those pertaining to activities conducted at the site, while banning offsite signs—those containing subject matter which is not site-related—without being deemed to have engaged in impermissible content discrimination. Pet. Br. 28-29. However, whether a sign is allowed or prohibited under Ladue's sign ordinance does not turn on any onsite/offsite distinction. Ms. Gilleo's sign expressing her personal views, and displayed at her residence to try to persuade others to adopt those views, falls into the onsite category, as would a sign announcing a "For Peace in the Gulf" phonathon or letter-writing gathering at Ms. Gilleo's home. Nevertheless, Ladue prohibits such signs. At the same time, Ladue accords the right to display onsite signs concerning their activities to churches, schools and religious institutions.

Ladue does allow its residents to maintain onsite commercial signs concerning the sale or lease of real estate. However, Ladue prohibits a resident from displaying a sign as part of an effort to sell an automobile or other property

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[19] Many signs contain graphics and symbols, and many flags contain verbal as well as symbolic messages. For example, the flag of Saudi Arabia reads: "There is no God but Allah, Muhammad is the Prophet of Allah." Mauro Talocci, *Guide to the Flags of the World* 69 (Whitney Smith ed. 1982). The flag of Iowa reads: "Our Liberties We Prize and Our Rights We Will Maintain." *Id.* at 180.

maintained at his or her residence. All such signs are onsite signs. Also, as previously noted, Ladue may allow its residents to maintain driveway and residence identification signs advertising their professions, which constitute offsite commercial signs since Ladue's zoning ordinance does not allow professionals to conduct their practices in residential districts.[20]

Thus, Ladue permits some onsite signs and some offsite signs while banning others in both categories. What Ladue has done is to pick and choose *by subject matter* which kinds of signs it will allow and which it will not. Ladue's regulatory scheme, accordingly, is wholly antithetical to the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, *supra*, 408 U.S. at 95.

Amici National Institute of Municipal Law Officers, *et al.* criticize the court of appeals for supposedly utilizing a "rigid, formalistic analysis" to determine that New Chapter 35 is content-based (Br. 4). However, this criticism is not well founded. Neither respondent's position, nor the reasoning of the court below, is grounded in the ordinance's allowance of signs like traffic signs, street signs or house numbers. Moreover, a strict analysis is exactly what the First Amendment requires. Neither a municipal government nor a court may impose its own value system with respect to protected speech, decreeing that some speech categories are important and will be allowed, while others are unimportant and may be banned.

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[20] *See* Ladue Zoning Ordinance No. 1175, *supra* note 17, at 4-5, 8-9.

Finally, no less rigid analysis would salvage the constitutionality of Ladue's sign ordinance. The exceptions to Ladue's general sign ban are by no means insignificant. The nature and breadth of the permitted signs demonstrate that Ladue has done precisely what the First Amendment forbids; it has selected the appropriate subjects for public discourse via signs. Moreover, Ladue has adopted a value system wholly at odds with the values inherent in the First Amendment. It has prohibited political speech, the most protected form of expression, while allowing other less protected forms of speech. Ladue's ordinance is content-discriminatory on its face.[21]

2. Ladue's Ordinance is Content-Based Under the Principles of the Plurality Opinion in *Metromedia v. City of San Diego*.

Ladue's sign ordinance also is impermissibly content-based under the principles of the plurality opinion in *Metromedia*, *supra*, 453 U.S. 490. In the plurality's view, the San Diego billboard ordinance at issue in *Metromedia*

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[21] The record also contains indicia of viewpoint discrimination. For example, viewed against the general backdrop of Ladue's ordinance, the fact that an American flag may be easily obtained and displayed suggests a bias in favor of patriotic speech. Also suggestive of viewpoint bias is Ladue's almost phobic aversion to "controversial" signs," as discussed *supra* at pp. 4-5 & nn.2-4 and *infra* at pp. 32-33 & n.25. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 812 (1985) ("concern to avoid controversy...may conceal a bias against the viewpoint advanced by the excluded speakers"). Similarly, with respect to the manner in which the ordinance has been enforced, there is evidence of yellow ribbons being displayed in Ladue during the Persian Gulf War (J.A. 190-92), and of the earlier display of signs like a Santa Claus sign and "Happy Birthday" yard cards (J.A. 62-63), with no corresponding evidence of any enforcement action against those types of signs.

permitted onsite commercial billboards but prohibited onsite noncommercial billboards. 453 U.S. at 513. On that basis, a constitutional flaw identified in the ordinance was that it accords "a greater degree of protection to commercial than to noncommercial speech," and thereby "inverts" the principle that "noncommercial speech [is accorded] a greater degree of protection than commercial speech." 453 U.S. at 513.

That it is constitutionally impermissible to favor commercial speech over noncommercial speech was not a radical concept invented by the *Metromedia* plurality. It was merely an application of the principle, articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980), that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *See also United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S. Ct. 2696, 2705 (1993); *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798 (1993); *Discovery Network*, *supra*, 113 S. Ct. at 1514-16; *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989). We are aware of no decision granting commercial speech greater protection than noncommercial speech, which is in effect what Ladue seeks in this case.

In *Discovery Network*, this Court held that the lesser constitutional protection accorded to commercial speech did not permit Cincinnati to ban commercial newsracks as a means of addressing aesthetic and traffic safety concerns associated with all newsracks, including those of a noncommercial nature. Surely, then, *Discovery Network* also means that Ladue cannot seek to address concerns arising from commercial and noncommercial signs alike by banning noncommercial signs while permitting commercial signs.

Accordingly, the principles articulated by the plurality in *Metromedia*, and relied on by the lower courts in this case, remain sound.[22]

3. Ladue Cannot Recast its Content-Based Ordinance as Content-Neutral Under the Secondary Effects Doctrine.

Ladue attempts to transmogrify its content-based ordinance into a content-neutral regulation based on the "secondary effects" doctrine articulated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). However, Ladue's secondary effects argument fails for several reasons.

a. Ladue contends that its sign ordinance should be deemed content-neutral because it is aimed not at the content of signs but at certain secondary effects allegedly flowing from signs, *i.e.*, visual blight, adverse effects on traffic safety, and intrusions upon residential privacy. That argument, however, is foreclosed by *Discovery Network*, *supra*, 113 S. Ct. 1505. There, Cincinnati contended that its selective ban against commercial newsracks should be deemed content-neutral under *Renton* because it was intended not to suppress the content of commercial publications but to address aesthetic and safety concerns impacted by an over-abundance of newsracks. The Court rejected Cincinnati's secondary effects argument on grounds that there were "no secondary effects attributable to respondent publishers'

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[22] The fact that a Missouri statute, Mo. Rev. Stat. § 67.317 (1986), prohibits political subdivisions from forbidding or restricting real estate signs does not make Ladue's sign ordinance any less content-discriminatory. Neither the State alone, nor the State acting in conjunction with Ladue, may restrict speech to any greater degree than may Ladue acting alone.

newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." 113 S. Ct. at 1517.

Here, likewise, to the extent, if any, that small signs adversely impact the aesthetic, safety or privacy interests relied on by Ladue, such impact arises to the same degree from the signs permitted by Ladue's ordinance. An 8½ by 11-inch window sign stating "For Peace in the Gulf" produces no greater visual blight, traffic safety problems or intrusion upon residential privacy than a two-foot by three-foot "For Sale" sign.

Ladue contends that the signs banned under its ordinance "proliferate" (Pet. Br. 2 and *passim*), while those permitted "are naturally limited in number" (Pet. Br. 23). That argument, however, is belied by the fact that Ladue has deemed it necessary to enact numerical, as well as size and location, restrictions for various of the signs permitted under its ordinance, including real estate signs, commercial signs, and signs for churches, religious institutions and schools. *See supra* at pp. 6-7, nn.6-8. Moreover, the other types of signs permitted under Ladue's ordinance without numerical limitation—*e.g.*, residence and driveway identification signs, driveway signs containing an infinite variety of warnings or directions, and flags—are no less (or more) likely to proliferate than are the signs banned by Ladue's ordinance.

Signs do not naturally proliferate. People put them up. The number of signs banned by Ladue's ordinance that would be posted in the absence of a ban would be limited by the same forces that limit the number of signs permitted under the ordinance—the good judgment and self-interest of Ladue's residents. As this Court stated in *Vincent*, "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." 466 U.S. at 811. Indeed, Ladue's entire position in this case is self-

defeating. If, as Ladue asserts, most of its residents do not want signs, the fact that they are permitted will not result in a proliferation of signs. Ms. Gilleo asks only that signs be allowed, not required.[23]

b. Ladue's secondary effects argument also fails because the impact from signs which Ladue seeks to avoid is not secondary in nature. In *Renton*, this Court upheld an

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[23] Ladue contends, wrongly, that the conclusions contained in the Drummond Affidavit, concerning the likelihood of sign proliferation in Ladue absent restrictions, must be accepted at face value. Pet. Br. 21. Mr. Drummond's conclusions are conjecture and opinion which add little to this case and do not preclude summary judgment in favor of Ms. Gilleo. *See Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1800-01 (1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977). Indeed, we doubt that Mr. Drummond's opinions even constitute admissible evidence. Any question as to the likelihood of sign proliferation in Ladue absent restrictions is best resolved by empirical evidence, not expert conjecture. *See* Fed. R. Evid. 701-03.

The main empirical evidence in the record concerning Ladue is the Affidavit of Nancy R. Sachs (J.A. 190), discussed *supra* at pp. 9-10, n.12. Ladue's only corresponding empirical submission consisted of statements by Mayor Spink, in her initial affidavit, that she had observed "Jay Levitch —50—Happy Birthday" signs at nine locations in February, 1991. J.A. 180. Significantly, however, eight of the nine signs were on utility poles on public property; only one was on private property. *See* Spink Aff. Exs. T-BB; Appellants' Appendix filed in the court of appeals August 19, 1992, Vol. II, Index (describing Spink Aff. Exs. T-BB). Beyond that, Ladue submitted a videotape as Exhibit HH to the Supplemental Affidavit of Edith J. Spink (J.A. 197), depicting a smattering of election signs posted in the cities of Brentwood and Clayton, Missouri, on a date less than two weeks prior to scheduled municipal elections. This tape merely demonstrates that even at the height of the political campaign season, political signs are limited in number and harmless.

ordinance restricting the location of adult theaters because it was aimed not at the content of the sexually explicit speech purveyed at those theaters, but at certain "secondary," or indirect, effects shown to stem from adult theaters. Here, by contrast, Ladue's ordinance is concerned with the direct, primary aspects of the expressive activities sought to be suppressed. What Ladue wants to prohibit is signs themselves, not some indirect effects resulting from signs. As this Court stated in *Vincent*, 466 U.S. at 810:

> With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape.... Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.

c. Ladue's secondary effects argument further is defective because it is based on viewers' reactions to signs. This Court has made clear that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id. See R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2549 (1992); *Forsyth County, Georgia v. Nationalist Movement*, ___ U.S. ___, 112 S. Ct. 2395, 2403-04 (1992).

The fact that Ladue's ordinance is based, at least in part, on viewers' reactions is demonstrated by Ladue's repeated assertions of "privacy" interests as a justification for its sign ordinance, both in the preamble to New Chapter 35 (J.A. 116-19) and throughout its brief (*e.g.*, pp. 2, 11, 26, 44). The asserted privacy interests can refer to nothing other than a desire on the part of certain Ladue residents not to be confronted with signs bearing messages which they deem

controversial. This is confirmed not only by the testimony discussed *supra* at pp. 4-5 & nn.2-4, but also by additional testimony from Ladue's witnesses.

Thomas Remington (the President of Ladue's City Council) testified, on deposition, to his belief that people come to Ladue "to obtain the peace and privacy [of]...an area of largely private streets where you're somewhat insulated from the controversies of the street corner." J.A. 47. He opined that people in Ladue "do not want to be captive audiences for neighborly disputes whether they're on a national scale, such as the Persian Gulf, or whether they're on the closing of Litzinger Road." J.A. 49.

Sally H. Gulick, a resident and trustee of Ms. Gilleo's subdivision, testified, on deposition, "I personally feel that I do not care to come home and see signs on people's yards with their opinions expressed on them." J.A. 61.[24] Ms. Gulick further testified that she did not find objectionable a sign displayed at a house several doors down from Ms. Gilleo's stating "Dear Santa, Julie lives here" (J.A. 62), but did object to Ms. Gilleo's sign for the principal reason that it is controversial (J.A. 63). In addition, she testified to having conferred with the two other trustees of Ms. Gilleo's and her subdivision, and that all three trustees agreed that they did not want signs in their subdivision that contained an opinion. J.A. 64.[25]

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[24] Ms. Gulick signed an affidavit filed by Ladue in the district court, and testified on behalf of Ladue at the preliminary injunction hearing. J.A. 60, 102.

[25] Ms. Gulick also testified that at a neighborhood meeting, Mr. Remington referred to the controversial nature of Ms. Gilleo's yard sign as possibly leading to vandalism in the neighborhood, and that being a good reason for opposing the sign. J.A. 65-66. She also recalled two of her neighbors expressing opposition to the sign at the meeting because they objected to the contents and to Ms. Gilleo's views on the Persian Gulf. J.A. 66. Ms. Gulick also testified that she was willing to put up with an ugly for-sale sign, but not an ugly sign that states somebody's opinion. J.A. 62.

That viewers may find speech like Ms. Gilleo's controversial is not a sufficient reason for suppressing it. "[T]he use of the 'controversial' nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Consolidated Edison Co., supra*, 447 U.S. at 548 n.9, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[26]

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[26] While, in light of the many other flaws in Ladue's position, the Court need not reach this point, we further submit that the secondary effects doctrine should be deemed wholly inapplicable to this case. The secondary effects test was conceived in *Renton* to address problems relating to businesses purveying sexually explicit materials. While this Court has indicated, without necessarily deciding, that the doctrine may be utilized in other contexts, *see Discovery Network, supra*, 113 S. Ct. at 1517; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry, supra*, 485 U.S. at 320-21 (plurality opinion); the Court never has squarely applied the secondary effects rationale to political speech. For the Court to do so "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Boos v. Barry, supra*, 485 U.S. at 335 (Brennan, J., concurring). Left unchecked, the secondary effects doctrine "could set the Court on a road that will lead to the evisceration of First Amendment freedoms." *Id.* at 338. We echo Justice Brennan's "hope that, when the Court is actually presented with a case involving a content-based regulation of political speech that allegedly aims at so-called secondary effects of that speech, the Court will recognize and avoid the pitfalls of the *Renton* approach." *Id. See also*, Geoffrey R.

B. Ladue's Ordinance Fails Strict Scrutiny.

As a content-based speech restriction, Ladue's ordinance must be subjected to the "compelling state interest" and "narrowly drawn" tests which comprise strict scrutiny, and satisfies neither.

1. Ladue's Ordinance is Not Necessary to Further a Compelling State Interest.

To justify a restriction against speech under strict scrutiny, it is not enough that the government identify some interest falling within the sphere of legitimate government concern. Rather, the asserted interest must be a compelling one. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939), quoted in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69 (1981). Moreover, the government "must demonstrate that its law is *necessary* to serve the asserted interest." *Burson v. Freeman*, *supra*, 112 S. Ct. at 1852 (emphasis added).[27]

Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 115-17 (1987); Floyd Abrams, *Content Neutrality: Some Thoughts on Words and Music*, 10 Harv. J.L. & Pub. Pol'y 61 (1987).

[27] The government has the burden "to articulate, and support, a reasoned and significant basis for its decision." *Schad*, *supra*, 452 U.S. at 77 (Blackmun, J., concurring). "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Id.*

Ladue's asserted justifications for its sign ordinance warrant particularly close scrutiny in light of their genealogy. Old Chapter 35 contained no findings or statement of purpose. J.A. 26. The first statement of the supposed purposes underlying Ladue's sign ordinance appeared in the preamble to New Chapter 35, adopted fourteen days after the district court invalidated Old Chapter 35, and drafted by Ladue's litigation counsel in this case.[28] The remaining justifications for Ladue's sign ordinance come from three affidavits that also were generated during the course of this litigation.

Not surprisingly, the preamble and affidavits purport to justify, on a *post-hoc* basis, the precise regulatory scheme maintained by Ladue. Whether a sign is "naturally limited in number" (Pet. Br. 23) and thus permitted, or supposedly proliferates and is banned, turns not on any logical or evidentiary basis, but on whether such sign is permitted or prohibited under the terms of Ladue's sign ordinance. Ladue has done exactly what Justice Brennan, in his dissenting opinion in *Vincent*, warned might happen were government officials permitted to restrict expression in the name of aesthetics:

> [W]hen a total ban is justified solely in terms of aesthetics, the means inquiry necessary to evaluate the constitutionality of the ban may be impeded by deliberate or unintended government manipulation. Governmental objectives that are purely aesthetic can usually be expressed in a virtually limitless variety of ways. Consequently, objectives can be tailored to fit whatever

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[28] *See* Invoice 62278 dated February 25, 1991, to City of Ladue from Armstrong, Teasdale, Schlafly, Davis & Dicus, Exhibit 1 to Application of Plaintiff's Counsel, Green, Hoffmann & Dankenbring, for Attorney's Fees and Expenses, filed in the district court October 21, 1991.

> program the government devises to promote its general aesthetic interests. Once the government has identified a substantial objective and has selected a preferred means of achieving its objective, it will be possible for the government to correct any mismatch between means and ends by redefining the ends to conform with the means.

466 U.S. at 825.

The interests identified by Ladue as supporting its ordinance—aesthetics, traffic safety and privacy—are not of sufficient magnitude within the context of this case to constitute compelling state interests. Neither this Court nor any other, to our knowledge, has held aesthetic concerns to be sufficient to warrant a ban against pure political speech on private property adjacent to a traditional public forum;[29] and it is hard to imagine such a holding, particularly in the context of a small unobtrusive sign displayed at a citizen's own home expressing her views on an important public issue.[30] As Justice Brennan stated in *Metromedia*, "I do not doubt that '[i]t is within the power of the [city] to determine that the community should be beautiful,'...but that power may not be exercised in contravention of the First Amend-

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[29] To the contrary, a number of cases have invalidated aesthetics-motivated bans against political signs. *See, e.g., Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

[30] Even were Ladue assumed to have the strongest possible aesthetic interests, we fail to see how such interests are at all impacted by an 8½ by 11-inch sign inside a window of Ms. Gilleo's home. Accordingly, under any circumstances, Ladue's sign ordinance is unconstitutional as applied to Ms. Gilleo.

> ment." 453 U.S. at 530 (concurring opinion), quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954).[31]

As to Ladue's asserted interest in traffic safety, there is nothing in the record demonstrating any connection between small signs and traffic safety, let alone establishing such a substantial connection that the interest may be deemed compelling.[32] This case presents just another example of a municipality using traffic safety as a pretext to try to justify a regulation which in fact is motivated by aesthetic concerns. *See Metromedia*, *supra*, 453 U.S. at 528-29 n.7 (Brennan, J., concurring) ("[I]n the case of billboard regulations, many cities may have used the justification of traffic safety in order

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[31] Ladue's attempt to equate its aesthetic interests to those of Williamsburg, Virginia is fallacious. In *Metromedia*, "the parties acknowledge[d] that a historical community such as Williamsburg, Va. should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield." 453 U.S. at 534 (Brennan, J., concurring). However, the parties surely were referring to restrictions against billboards, not small yard or window signs, and, moreover, to billboard restrictions extending not throughout the entire city of Williamsburg, but only to the historic section of Colonial Williamsburg, which comprises only a small part of the city. Colonial Williamsburg is essentially an outdoor museum. As such, it does not constitute a traditional public forum, and the government has much more leeway to regulate speech there. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, 112 S. Ct. 2701, 2705-06 (1992).

[32] The flimsy nature of Ladue's traffic safety argument is typified by the testimony of Mark Arnold, a witness for Ladue at the preliminary injunction hearing. Mr. Arnold expressed concern that someone might vandalize a controversial sign in his subdivision, the police might be called, and the vandal might attempt a vehicular escape through Mr. Arnold's driveway, thereby imperiling his young son and golden retriever, who play in the driveway. J.A. 99.

to sustain ordinances where their true motivation was aesthetics.").

With respect to privacy, Ladue's asserted interest not only is illegitimate because it pertains to viewers' reactions (*see supra* at pp. 31-33), it is unavailing for other reasons as well. A residential privacy interest is implicated only where speech intrudes into the home or is unduly coercive in nature. "[T]he ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Consolidated Edison Co.*, *supra*, 447 U.S. at 541, quoting *Cohen v. California*, 403 U.S. 15, 21 (1971). No basis exists for suppressing speech where the party asserting a residential privacy interest "is not attempting to stop the flow of information into his own household, but to the public." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

Ms. Gilleo's sign remained silently on her own property. It was not tantamount to a sound truck bombarding listeners with loud, raucous noise. *Compare Kovacs v. Cooper*, 336 U.S. 77 (1949). Nor was it like targeted picketing outside a particular residence, designed to cause psychological harm to those within. *Compare Frisby v. Schultz*, *supra*, 487 U.S. 474. Anyone preferring not to view Ms. Gilleo's sign could avoid doing so by averting his or her eyes. "[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-211 (1975), quoting *Cohen v. California*, *supra*, 403 U.S. at 21. *See Spence v. State of Washington*, 418 U.S. 405, 412 (1974)

("Anyone who might have been offended could easily have avoided the display.").[33]

2. Ladue's Ordinance is Not Narrowly Drawn.

Even were Ladue able to satisfy the compelling state interest test, it further must show that its ordinance is "narrowly drawn," *i.e.*, that it is the least restrictive means of achieving its purposes. *Boos v. Barry*, 485 U.S. 312, 329 (1988). *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989).

Except, perhaps, for its illegitimate privacy argument, Ladue has not seriously maintained that Ms. Gilleo's particular sign adversely impacts any of Ladue's municipal interests. Rather, Ladue's asserted concern is a fear of an uncontrolled proliferation of signs. To address this concern, Ladue has banned virtually all signs, except those it happens to favor.

There are a number of less restrictive alternative regulatory approaches available. Ladue might adopt reason-

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[33] Ladue's argument concerning "captive audiences" (Pet. Br. at 44-45) derives from cases which are wholly distinguishable. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), concerned a city's right to control advertising on city-owned buses and streetcars, which were deemed not to constitute a public forum. *Packer Corp. v. Utah*, 285 U.S. 105 (1932), involved a challenge on grounds other than the First Amendment to limitations on tobacco advertising by billboard or placard. As to Ladue's argument concerning a homeowner's "right to be free from picketing that disturbs 'the sanctity of the home'" (Pet. Br. 45, quoting *Frisby v. Schultz*, *supra*, 487 U.S. at 484), we note, in addition to the matters discussed above, that "we must be careful not to confuse sanctity with silence." *Burson v. Freeman*, *supra*, 112 S. Ct. at 1866 (Stevens, J., dissenting). A sign may be a nuisance to some, but it is also a manifestation "of a vibrant democracy." *Id.* at 1867.

able restrictions governing the size of signs, the number of signs that may be displayed on a piece of property at one time, or where on the property such signs may be placed. Ladue might reasonably limit the overall number of signs that may be on display within the city, or a particular subdivision, at one time; or reasonably regulate the period of time that signs might be displayed.

Instead, Ladue has adopted the *most restrictive* approach of banning virtually an entire mode of speech throughout the city. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963), quoted in *Edenfield v. Fane*, *supra*, 113 S. Ct. at 1803-04. Ladue's ordinance has all the precision of a meat-ax.

This case is closely analogous to *Schneider v. New Jersey*, *supra*, in which the Court held that a ban against distribution of handbills was not a permissible means of preventing littering because "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." 308 U.S. at 162. Similarly analogous is *Martin v. City of Struthers*, 319 U.S. 141 (1943), in which the Court held that banning door-to-door solicitation was not an allowable means of protecting residential privacy and deterring crime because there were less restrictive means of addressing those problems, *e.g.*, prohibiting solicitation at homes where the owner has manifested a desire not to receive solicitors, and requiring solicitors to have identification devices. *Id.* at 146-49. Ladue's ordinance is not narrowly drawn.

III. Ladue's Sign Ordinance is Unconstitutional Even if Viewed as Content-Neutral.

A. Ladue's Ordinance is an Unjustified Ban Against a Mode of Political Expression.

Assuming *arguendo* that Ladue's sign ordinance is content-neutral, it nonetheless imposes virtually a complete ban against small signs as a medium of expression within Ladue. Where a speech restriction is content-neutral, but operates to ban a mode of expression as opposed to merely regulating the time, place and manner of speech, such a restriction must survive a level of scrutiny closely akin to strict scrutiny to be constitutional. It must be necessary to "further a sufficiently substantial government interest" and be "narrowly drawn." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). *See Martin v. City of Struthers*, *supra*; *Schneider v. New Jersey*, *supra*; *Metromedia*, *supra*, 453 U.S. at 527 (Brennan, J., concurring).[34]

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[34] The level of required scrutiny remains high even assuming Ladue's sign ban to be content-neutral because the ordinance drastically reduces the *quantity* of political and other speech otherwise permissible in Ladue. The First Amendment is concerned not only with ensuring that public debate not be distorted by content-discriminatory governmental regulations, but also with ensuring an adequate quantity of public debate. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976) ("contribution and expenditure limitations impose direct quantity restrictions on political communication and association"). *See generally* Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 57-71 (1987). Also, a content-neutral regulation does not necessarily affect all speakers equally. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, *supra*, 112 S. Ct. at 2720 (Kennedy, J., concurring) ("A grant of plenary power allows the government to tilt the dialogue heard by the public, to exclude many, more marginal voices."); *Burson v. Freeman*, *supra*, 112 S. Ct. at 1864 (Stevens, J., dissenting) ("Tennessee's content-based discrimin-

For the same reasons as discussed *supra* at pp. 34-40, even assuming Ladue's ordinance to be content-neutral, Ladue has made no showing that could justify virtually a complete ban against small signs as a medium of expression in Ladue and, in particular, a ban against signs containing political speech. Ladue's ordinance is not necessary to fulfill governmental interests which are sufficiently substantial, and is not narrowly drawn.[35]

B. Ladue's Ordinance Cannot be Justified as a Content-Neutral Regulation of Time, Place and Manner of Speech.

Where a speech restriction is content-neutral and only limits the permissible time, place and manner of speech, rather than banning a mode of expression, it will be deemed constitutional if it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n*, *supra*, 460 U.S. at 45. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). Ladue seeks to validate its ordinance under this framework; however, its efforts fail for several reasons.

1. As discussed previously, Ladue's sign ordinance is not content-neutral, and does not regulate the time, place and manner of speech. Signs prohibited in Ladue are prohibited "at any time, at any place, and in any manner." *Lovell v.*

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ation is particularly problematic because such a regulation will inevitably favor certain groups of candidates.").

[35] It is not entirely clear from this Court's precedents whether the level of scrutiny applicable in the above context is identical to strict scrutiny or slightly less strict. *See* Stone, *Content-Neutral Restrictions*, cited *supra* at p. 41 n.34, at 64-71. In either event, the analysis and conclusions applicable in this case are the same.

City of Griffin, 303 U.S. 444, 451 (1938). *See United States v. Grace*, 461 U.S. 171, 181 (1983) (ban on specified communicative activity on public sidewalks around Supreme Court grounds "cannot be justified as a reasonable place restriction"); *Metromedia*, *supra*, 453 U.S. at 516 (plurality opinion) (rejecting suggestion that ordinance is time, place and manner restriction because "[s]igns that are banned are banned everywhere and at all times").

Further, Ladue's ordinance is not narrowly tailored. *See supra* at pp. 39-40. While the narrowly tailored requirement in the time, place and manner context may not be as stringent as under strict scrutiny, *see Board of Trustees v. Fox*, *supra*, 492 U.S. at 476-480; *Ward*, *supra*, 491 U.S. at 797-800; the test is not "overly permissive." *Fox*, *supra*, 492 U.S. at 480. It means that the government may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, *supra*, 491 U.S. at 799. Put another way, "the means chosen [may not be] substantially broader than necessary to achieve the government's interest." *Id.* at 800. There must be a "reasonable fit" between the government's asserted interests and "the means chosen to serve those interests." *Discovery Network*, *supra*, 113 S. Ct. at 1510. *See Fox*, *supra*, 492 U.S. at 480.

Ladue addresses a concern that signs might proliferate, not by adopting reasonable regulations limiting their number, size, point of placement or duration of display, but by banning most signs throughout the city, except those which Ladue favors. Moreover, Ladue takes this broad-brush approach against disfavored signs even though permitted signs produce the same effects as signs that are banned. Ladue's sign ordinance thus burdens substantially more speech than necessary to serve its asserted interests, and

there is a lack of a reasonable fit between Ladue's desired ends and chosen means.

Ladue's ordinance further fails the time, place and manner test because it does not leave open ample alternative channels of communication.[36] Ladue's argument to the contrary ignores the unique aspects of signs as a mode of expression, as discussed *supra* at pp. 17-18. Ms. Gilleo acquired her yard sign for $4.00 (J.A. 42), and spent no more than two or three minutes hammering it into the ground (J.A. 78). No doubt, the placement of her window sign required similarly little time, effort and expense. All of the alternatives put forth by Ladue are more expensive, more time consuming or less effective than the mode of communication chosen by Ms. Gilleo. Accordingly, Ladue's postulated substitutes are not adequate alternatives. *See Linmark Associates, Inc. v. Township of Williamsboro*, 431 U.S. 85, 93 (1977); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, 112 S. Ct. 2711, 2727 (1992) (Souter, J., concurring and dissenting).

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[36] Ladue contends that this issue was not raised before the Eighth Circuit and, therefore, may not be raised here. Pet. Br. 40 n.11. Ladue is wrong both factually and legally. Throughout these proceedings, Ladue has sought to justify its ordinance under the time, place and manner test, an integral component of which is whether the regulation leaves open ample alternative channels of communication. Accordingly, the issue of alternative channels was squarely before the Court of Appeals. *See, e.g.*, Appellants' Brief, filed in the Court of Appeals August 19, 1992, at 25, 40-41. Moreover, respondent specifically addressed the point at oral argument. Further, it is not even necessary that the point have been raised below for it to be asserted here, since Ms. Gilleo is entitled to defend the judgment on any grounds supported by the record, whether or not specifically raised below. *See, e.g., Bondholders Committee v. Commissioner of Internal Revenue*, 315 U.S. 189, 192 n.2 (1942).

In *Linmark*, this Court held that real estate signs could not be banned, despite the availability of alternative advertising means, because some of the suggested alternatives are not used to market real estate "in practice," and others "may be less effective media for communicating the message." 431 U.S. at 93. Here, similarly, small signs displayed at a residence are a traditional and ideal means of expressing the occupants' support for political candidates, or personal views on other public issues, for which there is no equivalent substitute.

This Court, in voiding an ordinance banning door-to-door distribution of literature in *Martin v. Struthers*, *supra*, observed that "[d]oor-to-door distribution is essential to the poorly financed causes of little people." 319 U.S. at 146. These words are a poignant reminder of the importance of according constitutional protection to a mode of expression like small signs which "is a relatively inexpensive, highly convenient, and markedly effective outlet for the promulgation of ideas and information by persons who do not themselves have access to more traditional media facilities." Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 257.

2. In advancing its time, place and manner argument, Ladue places great reliance on *Vincent*; however, that reliance is misplaced. Of central importance in *Vincent* was that the utility pole wires on which signs were placed were deemed not to be a public forum. 466 U.S. at 813-814. Governments have far greater latitude to restrict speech on "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 814-15.

Moreover, the Court viewed the regulation at issue in *Vincent* as unquestionably content-neutral. 466 U.S. at 804.

Also, the regulation was not a total ban against signs anywhere in the city, but only a restriction against placing them on utility poles on public property. The Court noted that "by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved." *Id.* at 811.

Vincent, therefore, is readily distinguishable from this case on at least three grounds. *Vincent* concerned a content-neutral regulation of the time, place and manner of speech in a non-public forum, whereas this case presents a content-based ban against a mode of expression on private property adjacent to a traditional public forum. Accordingly, *Vincent* does not compel a conclusion that Ladue's sign ordinance is constitutional.

IV. This Case has Little, if Anything, to do with the Federal Highway Beautification Act.

Ladue contends that "[t]he lower courts' opinions jeopardize the constitutionality of the Highway Beautification Act of 1965," Pub. L. 85-767, 72 Stat. 904 (codified as amended at 23 U.S.C. § 131 (1988 & Supp. IV 1992)). Pet. Br. 48. Ladue thus seeks to accomplish by indirection what it cannot do directly. Having failed to sustain the constitutionality of its sign ordinance under any recognized analytical framework, Ladue tries to raise fears of how a decision in this case might be applied in a different context.

Ladue's Highway Beautification Act argument is a red herring. We assert no challenge here, and raised none below, to the constitutionality of the Highway Beautification Act. Moreover, the Act and Ladue's sign ordinance, and the respective communication modes to which they are addressed, are so dissimilar that this case has little, if any, relevance to any questions arising under the Act.

In contrast to Ladue's sign ordinance, the Act does not impose a total ban against a particular mode of expression throughout a political subdivision. The Act merely regulates the placement of billboards in proximity to federal highways. 23 U.S.C. § 131 (b)-(d). Also, the Act's restrictions have no application in commercial or industrial areas. 23 U.S.C. § 131 (d). Accordingly, the Act is a time, place and manner regulation.

Moreover, with respect to distinctions based on content, the Act reflects a very different regulatory scheme than that contained in Ladue's ordinance. Unlike Ladue's ordinance (*see* discussion *supra* at pp. 24-25), the Act essentially allows onsite signs, while prohibiting offsite signs. 23 U.S.C. § 131 (c). *See Wheeler v. Commissioner of Highways*, 822 F.2d 586, 593 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988). A regulation distinguishing between onsite and offsite signs is not necessarily content-discriminatory. *See Discovery Network*, *supra*, 113 S. Ct. at 1514 n.20.

Further, the Act is concerned with billboards whereas Ladue's ordinance extends to small signs. While certain parallels exist between small signs and billboards, there are important differences. "[W]hatever its communicative function, the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to ...regulation.'" *Metromedia*, *supra*, 453 U.S. at 502 (plurality opinion), quoting lower court opinion, 26 Cal. 3d at 870, 610 P.2d at 419, 164 Cal. Rptr. at 522.

Indeed, in *Metromedia*, it was settled even before the case arrived in this Court that the San Diego ordinance restricting "outdoor advertising display signs" should be construed as not extending to "a small sign placed in one's front yard proclaiming a political or religious message." 26

Cal. 3d at 857 n.2, 610 P.2d at 410 n.2, 164 Cal. Rptr. 513 n.2. Noting that such signs "present no significant aesthetic blight or traffic hazard" and are "of a character very different from commercial billboards," the California Supreme Court adopted a narrowing construction "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." *Id. See* 453 U.S. at 494 n.2 (plurality opinion).

This Court repeatedly has recognized that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia*, *supra*, 453 U.S. at 501 (plurality opinion) (footnote omitted). *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Billboards are to small window or yard signs what sound trucks are to quiet conversation. Accordingly, the legal principles pertaining to small signs and billboards are not necessarily interchangeable.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 14, 1993

APPENDIX